No. 278

In the Supreme Court of the United States

OCTOBER TERM, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD, CO-PARTNERS, DOING BUSINESS AS J. T. BUDD, JR., AND COMPANY, KING EDWARD TOBACCO COMPANY OF FLORIDA, AND MAY TOBACCO COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice, Washington 25, D. C.

EDWARD GOTTLIEB,
Counsel,

BERNICE STEINHARDT,
Associate Counsel,

JAMES B. [illegible],
Attorneys,
Department of Labor, Washington 25, D. C.

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OPINIONS BELOW

The opinion of the District Court (RK 55; RB 145)[1] is reported at 114 F. Supp. 865. The opinion of the Court of Appeals (RK 89; RB 159) is reported at 221 F. 2d 406.

[1] "RB" references are to the Record in *Budd*, while "RK" references are to the Record in *King Edward*.

JURISDICTION

The judgments of the Court of Appeals (RK 96; RB 166) were entered on April 15, 1955. By order of Mr. Justice Black, dated July 8, 1955, the time for filing a petition for a writ of certiorari was extended to and including August 1, 1955 (RK 96; RB 166). The petition for a writ of certiorari was filed on July 29, 1955, and was granted on October 17, 1955 (RK 97; RB 167). 350 U. S. 859. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the regulation of the Administrator of the Wage and Hour Division, defining "area of production" pursuant to Section 13 (a) (10) of the Fair Labor Standards Act, which provides exemption from both minimum wage and overtime requirements of the Act for employees engaged in specified operations "within the area of production (as defined by the Administrator)," is valid.

2. Whether employees of tobacco bulking plants are engaged in the specified operations on agricultural or horticultural commodities to which the exemption provided by Section 13 (a) (10) applies.

3. Whether off-the-farm employees employed by respondents King Edward and May in tobacco bulking plants engaged in the same processing operations as respondent Budd, except that they

process only tobacco grown by the processor whereas Budd processes tobacco grown by numerous small farmers, are employed in "agriculture" within the meaning of Section 3 (f) of the Fair Labor Standards Act, and are therefore exempted by Section 13 (a) (6) from the minimum wage and overtime provisions of the Act.[2]

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), and the pertinent administrative regulations (29 CFR, Ch. V, § 536.2) and administrative findings are set forth in the Separate Appendix (hereafter cited as Sep. App.), pp. 1–3, 4–40.

STATEMENT

These actions were brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondents from violating the minimum wage and record keeping provisions of the Act. The employees involved work in tobacco bulking or processing plants operated by the three

[2] The petition for certiorari also included among the questions presented the applicability of the Section 13 (a) (6) exemption to the employees of respondent Budd. While Budd claimed the Section 13 (a) (6) exemption in its answer (RB 11, 25–26, 40) and fully briefed the claim to this exemption in the court below (Br. of Appellant Budd, pp. 12–25, 34–40), it has now abandoned reliance on this exemption. See page 5 of Brief for Respondents in Opposition to the Petition for Certiorari. This question has been rephrased accordingly.

respondents in the town of Quincy, Florida (RB 1–2, 4, 146; RK 1, 4, 37–38, 40, 67–68), and respondents claim that these employees are exempted from the wage provisions of the Act.

1. Respondents' processing operations relate to U. S. Type 62 Sumatra tobacco which is a leaf tobacco grown and used exclusively for cigar wrappers (RB 41, 48; RK 6). Type 62 requires a special kind of cultivation and curing (RB 41, 56; RK 6–10). It is grown in fields completely enclosed and covered with cheesecloth shade. When each leaf of tobacco reaches a certain state of maturity it must immediately be harvested through a process known as "priming." The lower leaves are picked first, perhaps two or three from each tobacco stalk. This picking is repeated as the tobacco matures until the operation has been repeated six or seven times. At each priming, the tobacco is immediately taken into a tobacco barn located on the farm, where it is strung on sticks and dried by means of heat. When the tobacco is almost completely dried, the drying process is interrupted and the tobacco is permitted to absorb moisture and again dried (RB 147, 148). The drying process is repeated until the tobacco has reached a stage in the process of curing when it is ready for the bulking plant involved in this case (*ibid.*). All the tobacco goes through this drying and redrying treatment in the barns before it reaches the bulking plant. Although some fermentation begins

at this stage, the treatment in the barns is essentially a simple drying operation during which the moisture content of the tobacco is decreased from between 85% and 80% to between 25% and 10%, a moisture content of 25% being required for best results in the subsequent bulking and fermentation process (RK 8–9, 23–24, 26). As each priming reaches the appropriate stage, it must immediately be packed in boxes and taken from the farms to the bulking plant for further processing.

The bulking process, although in one sense a continuation of the preliminary curing which begins in the barn, is a much more complex process requiring extensive and expensive industrial equipment and much more carefully controlled conditions. (RK 22–27). In the bulking plant, the tobacco is immediately placed in piles known as "bulks" consisting of and requiring from 3,500 to 4,500 pounds of tobacco; any lesser amount will not retain and generate sufficient heat for the sweating and fermentation process. During this operation the temperature within the bulks is closely watched each day, and at regular intervals of from six to eight days the bulk is turned or shaken out, that is, the tobacco on the outside is placed on the inside and that on the top is placed on the bottom until the tobacco is in a condition in which it may be worked. At this point, the tobacco is then separated, graded, kased (sprayed with water), and again placed

in bulks where the fermentation and the turning of the bulk continues until such time as the tobacco is in condition to be baled (RB 42, 56).

Expert evidence in the record of the *King Edward* case reveals that the bulking process involves considerably more than simply drying out or removing moisture from the tobacco. The process is described as a "fermentation" or "aging" process which is "largely a process of slow combustion" (RK 24–25), involving carefully controlled regulation of heat, temperature and humidity conditions to insure "development of the desired odor and aroma and elimination of the rawness or harshness and in part the bitter taste which characterize all freshly cured leaf. * * * It is quite important, therefore, that the fermentation be properly controlled * * *" (RK 22–23). In order to maintain proper temperature distribution throughout the bulking process, it is necessary that the bulk be "torn down and rebuilt" and the contents "redistributed" several times, and additional water added. "After each rebuilding of the bulk temperature rises more slowly and fails to attain the previous maximum unless additional water has been added." (RK 26). This bulk reconstruction process must be repeated usually from three to five times before the fermentation is completed (*ibid.*). Substantial dry matter, as well as moisture, is lost during the fermentation process, sometimes more dry matter than moisture (RK

27): "There is an important loss of nicotine, commonly ranging from 15 to 25 percent or more of the total originally present" (RK 27), and what starch or sugar content there may be in the tobacco is further reduced (RK 28). The bulking process "lasts 6 to 12 months or longer" (RK 25; RB 43, 49).

2. This tobacco bulking process requires a large amount of valuable and expensive equipment, including a steam heated plant equipped with humidifying sprays, bulking platforms, kasing machinery and sprays, thermometers and thermometer tubes, bulk covers, baling boxes and presses, wax paper, bailing mats, packing, sorting and grading tables (RB 42, 56). These operations also require workers with special knowledge and experience in the processing of tobacco. Such a bulking plant cannot be economically owned or operated by the ordinary small farmer growing less than 100 acres of this type tobacco a year (RB 35–36). Cultivation of less than 65 acres per year, moreover, will not yield an adequate bulk of each priming for the processing operations (RB 36). Of the approximately 300 farmers growing Type 62 tobacco, 80 percent grow less than 25 acres per year and the majority grow from 1½ to 10 acres per year (RB 30, 146). There are only 11 bulking plant operators engaged in processing Type 62 tobacco and two of these are not growers at all (RK 56, 84A).

Only five, or 1.6 percent, of the 300 growers maintain bulking plants processing only tobacco grown by the processor (*ibid.*). Thus, the overwhelming majority of farmers have their tobacco processed by others.

3. Respondent Budd Company grows no tobacco itself and confines its operations to processing the tobacco grown by 52 (the number for 1950) small farmers (on a total of 263 acres). During 1950, all of the 333,889 pounds of tobacco grown by these 52 farmers which was processed by Budd was also purchased by Budd, which sold 231,209 pounds to the Budd Cigar Company; the remainder of the tobacco was sold in interstate commerce to various other persons or companies (*ibid.*). Respondent Joseph T. Budd, Jr., is president of the Budd Cigar Company and as such is active in the management of that corporation (RB 141, 142).

4. The other two plants involved in this litigation (those of respondents King Edward and

May) process only tobacco produced on farms operated by the processor.[8] In addition to the plant involved in this litigation, respondent King Edward also operates two other bulking plants at which it processes substantial amounts of tobacco grown by others (RK 13). For 1951, King Edward bulked at its three plants approximately 595,901 pounds of tobacco, of which 354,967 was not grown on its farms but was purchased from other growers (RK 13).

Each farm and each bulking plant operated by King Edward is under the direct supervision of a superintendent who hires, fires, controls, and pays the employees (RK 14). Each bulking plant has its own separate payroll and production records which are maintained by King Edward's main office employees from records forwarded by the various superintendents (RK 14). Different wage scales are maintained as between farm employees and plant employees (*ibid.*). The cost to King Edward, in 1950, for tobacco purchased from others was $744,262.39, whereas the farm cost for growing tobacco on its rented farms amounted to only $482,709.80 (RK 14). The bulking plant cost for the 1950 crop was $215,463.47, plus an "administrative cost" of

[8] King Edward, however, owns none of the farm lands, tenant houses, warehouses or land beneath the warehouse, all of which is owned by Jno. Swisher & Son, Inc., of which King Edward is an affiliate (RK 13); such lands and building are leased to King Edward on an annual rental basis of approximately $100,000 (RK 13).

$62,643.06 (*ibid.*); the farm cost of $482,709.80 represented approximately 32 percent of the total cost of $1,505,078.72 to King Edward for its operations on the 1950 crop (*ibid.*).

5. The Budd plant employs approximately 108 employees in bulking, sorting, grading and baling tobacco (RB 47, 51–52, 141, 142); while King Edward employs approximately 120 employees and May approximately 70 employees in the same operations (RK 1, 4, 35, 40). The parties agree that none of the employees engaged in such operations were paid the minimum wage required by the Act (RB 141, 142; RK 46, 64); nor have the respondents maintained the records of wages, hours and other conditions of employment required by the Act (RB 156; RK 46, 64–65).

On cross-motions for summary judgment filed by the respective parties, the District Court entered decrees (RB 155–156; RK 77–78) enjoining respondents from violating the minimum wage and record keeping provisions of the Act. The District Court held that the Act's agriculture exemption (Sep. App., pp. 1, 2–3) ends when the tobacco reaches the receiving platform of the bulking plant, and rejected respondents' claims that their bulking plant employees are exempt from the Act under Sections 13 (a) (6) and 13 (a) (10) (Sep. App., pp. 2–3) (114 F. Supp. 865).

The Court of Appeals reversed, holding that the agriculture exemption applies to employees in

the King Edward and May plants which process only tobacco grown by the processor, and that the Section 13 (a) (10) exemption (Sep. App., p. 3) applies to th eprocessing plants of all three of the respondents when the operations are performed within the "area of production." The court recognized that one of the conditions of the Administrator's definition of "area of production" was not met by any of the processing plants, but it held that the definition was invalid insofar as it limits the area of production to "the open country or in a rural community" and excludes "any city, town or urban place of 2,500 or greater population." The court ruled that the Secretary of Labor was in no position to seek the remedy of injunction until a valid definition is made, since respondents "might likely fall with[in] a valid definition."

SUMMARY OF ARGUMENT

I

A. The Wage and Hour Administrator's definition of "area of production," pursuant to Section 13 (a) (10) of the Fair Labor Standards Act, is valid. That definition has now been in effect for 9 years, and indeed is, in essence, the same as an alternative definition issued over 16 years ago which contained virtually the same "rural area" or "population" criterion, and was left untouched by this Court's decision in *Addi-*

son v. *Holly Hill Co.*, 322 U. S. 607. As incorporated in the redefinition here in issue, it was affirmatively upheld three years ago by the Tenth Circuit in the *Traders Compress* case (199 F. 2d 8) and a petition for certiorari was denied (344 U. S. 909).

The redefinition represents a most careful and deliberate effort by the Administrator to apply the guides enunciated in this Court's *Holly Hill* opinion. It was issued in December 1946, after extensive investigations and public hearings, including a special study of the tobacco industry, and was again thoroughly re-examined in 1951, after it had been in operation for more than four years. The objective of the redefinition was to meet the requirement of *Holly Hill* that the definition be in terms of "area" or "geographic bounds," taking into account this Court's explicit recognition that the Administrator's task was not a simple map-making one, but involved "complicated economic factors" which "the Administrator may properly weigh and synthesize" in delimiting the bounds of the areas. 322 U. S. at 613–616. The objectionable limitation of the previous definition, restricting the number of employees that might be employed in an exempt plant, was omitted, and the redefinition prescribed only that the place of employment be located in a rural area—outside a town of more than 2,500 population—and within a specified

mileage distance from the source of most of its commodities.

The "rural area" or "population" criterion, which is the sole condition here in issue, rested upon the plain Congressional intent to distinguish "between rural communities and the urban centers." The line drawn on the basis of the size of the town represents an effort to exclude from the area of production, insofar as feasible in a definition of general application, the urban industrial centers without excluding the areas of agricultural production. In choosing the 2,500 population figure, the Administrator relied heavily on the results reached by other Government agencies having long experience in distinguishing between rural and urban areas.

Respondents themselves do not appear to question the size of the town as a proper standard. Their quarrel is not with the standard itself but with the administrative judgment in drawing the line at the 2,500 figure. But this is precisely the task which the Court has recognized was left by Congress to the "experienced and informed judgment" of the Administrator rather than to "the contingencies and inevitable diversities of litigation" (*Holly Hill* decision, 322 U. S. at 614). As the Court stated in upholding a comparable line prescribed by the Administrator for the mileage standard: "It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must

be, and that there is no mathematical or logical way of fixing it precisely, the decision of the [Administrator] must be accepted unless we can say that it is very wide of any reasonable mark." *Id.* at 611. That cannot be said here.

B. Any doubt of the validity of the redefinition has been eliminated by Congressional approval subsequent to its issuance. Although repeatedly advised of the definition and of the criticisms made of it, and despite specific proposals to change it, Congress has declined to modify the definition or revise the statutory language. Of particular significance—in view of the respondents' reliance on the Secretary of Agriculture's definition of "production area"—is the Congressional rejection of a proposal to transfer authority to define "area of production" from the Administrator to the Secretary of Agriculture. Congress has not only declined proposed revisions, but has affirmatively approved existing administrative regulations in Section 16 (e) of the Fair Labor Standards Amendments of 1949. See *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16–17; *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 270.

II

Irrespective of the validity of the definition of "area of production," respondents' bulking plant employees do not meet the other requirements for exemption under Section 13 (a) (10)

because the processing operation in which they are engaged is not one of those specified in that section nor is it limited to "agricultural or horticultural commodities." The specificity of Section 13 (a) (10) precludes the exemption's applying to processing operations not expressly mentioned. *Powell v. United States Cartridge Co.*, 339 U. S. 497; *Holly Hill* decision, 322 U. S. at 617; *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U. S. 755.

(1) The tobacco bulking process is not specifically enumerated in Section 13 (a) (10), as are "ginning," "pasteurizing," "compressing" and "canning," which are forms of industrial or quasi-industrial processing that may change the natural state of commodities in a way possibly analogous to tobacco bulking. Nor is tobacco bulking "drying," which, by any recognized definition, is limited to simple dehydration or removal of moisture. Most of the moisture has been removed from the tobacco in the preliminary barn curing process on the farm before the tobacco reaches the bulking plant. The bulking process, on the other hand, is a complex, carefully conditioned and prolonged process requiring extensive and tremendously expensive industrial equipment and special skills, and involves more addition than it does removal of moisture. Equally inapplicable to tobacco bulking are the general terms "handling," "packing," or "storing," which plainly refer to simple non-processing

operations which do not substantially change the raw or natural state of commodities.

Like the sugar milling in *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 268, the tobacco bulking process is more an "industrial" or "manufacturing operation" in the course of which the tobacco is very substantially changed from its "raw or natural state." The context of the phrase "agricultural or horticultural commodities" in Section 13 (a) (10), as well as the relationship of this exemption to other exemptions for processing of such commodities (notably Section 7 (c)), demonstrate that the general terms in Section 13 (a) (10) all relate to operations on the natural commodity prior to its industrial processing.

(2) Moreover, tobacco processing was specifically and deliberately omitted from both this exemption and the general agriculture exemption (Section 13 (a) (6)). Specific proposals to include tobacco warehouse employees within these exemptions were repeatedly rejected both in the House and in the Senate, and even these proposals did not go so far as to propose exemption for tobacco processing operations. The debates on the proposals plainly indicate that they were rejected because their effect might have been to exempt processing operations. The legislative history also shows that the term "processing" and processing operations generally, except for those specifically enumerated (*i. e.* "ginning,"

"pasteurizing," "compressing," and "canning") were deliberately omitted from this exemption by its sponsors in both the House and the Senate.

(3) Further confirmation of the intent to exclude processing operations, except for those specifically enumerated, may be found in the Section 7 (c) exemption, *from the overtime requirements only*, of "first processing" of agricultural commodities, which must be read in *pari materia* with the other exemptions relating to agricultural operations. If Section 13 (a) (10), which grants a complete wage and hour exemption, is construed to include operations which properly may be classified as "first processing," the limited exemption in Section 7 (c) becomes meaningless. The tobacco bulking process here constitutes "first processing" under Section 7 (c) rather than any of the operations listed in Section 13 (a) (10), and Section 7 (c) "marks the outer limit of congressional concession to this type of processing." See *Waialua*, 349 U. S. at 269.

(4) The Administrator's interpretation that the tobacco bulking process is not included in Section 13 (a) (10), like the Administrator's regulation defining "area of production" (see *supra*, p. 14), has been ratified by subsequent legislative developments. The interpretation was repeatedly stated and published long before the 1949 Amendments to the Act and was outstanding at the time of the enactment of the Fair

Labor Standards Amendments of 1949. It is, therefore, within the scope of Section 16 (c) of that Act which explicitly kept "in effect" outstanding interpretations of the Administrator or the Secretary, not inconsistent with those amendments.

III

The general agricultural exception in Section 13 (a) (6), admittedly inapplicable to respondent Budd's plant (which processes tobacco grown by numerous small farmers), is also inapplicable to the off-the-farm bulking plant operations of respondents King Edward and May (which process only their own tobacco), because the bulking process is not "agriculture" as defined in Section 3 (f).

(1) As this Court recognized in its *Waialua* decision, the Congressional scheme in Sections 13 (a) (6) and 13 (a) (10) was to equalize the status of large and small farmers, both provisions being equally concerned with "marking the dividing line between processing as an agricultural function and processing as a manufacturing function" (349 U. S. at 268). The omission of a processing operation from Section 13 (a) (10) is most significant evidence that Congress "concluded that it also fell outside the agriculture exemption" (*Ibid.*). Conclusive evidence that Congress deemed tobacco processing to be outside the scope of the "agriculture" exemption

is the fact, mentioned above, that the specific proposals to exempt tobacco warehouses, which were repeatedly rejected, were offered as amendments both to the definition of agriculture and to the provision which subsequently became Section 13 (a)(10).

(2) The Fifth Circuit's opinion, which was rendered prior to this Court's decision in *Waialua*, relies solely on two factors which, under the latter decision, plainly do not determine the applicability of the agriculture exemption. That exemption was held inapplicable to Waialua's sugar processing plant (1) despite the fact that Waialua, like the plants of King Edward and May, processed only its own grown agricultural commodity, and also (2) despite the fact that the commodity, "unmilled sugar cane", is "unmarketable as such" and "must be processed within a few days of harvesting or serious spoilage will result" (349 U. S. at 257, 265). Indeed, the sugar milling in Waialua was much more essential for marketing the crop, and much closer in both time and sequence to the actual farming, than is the tobacco marketing process.

On the other hand, the factors—ignored by the court below—which this Court held in *Waialua* to be most pertinent and significant are equally, if not more, determinative in the instant case. Thus, the undisputed evidence shows that the tobacco

bulking operation is not "ordinarily done by farmers," and the operation "is certainly an industrial venture" which "transforms" the tobacco "from its raw and natural state" resulting in a change "more akin to manufacturing than to agriculture" (349 U. S. at 265). The final significant factor which establishes the parallel between this case and the Waialua sugar mill is the "omission * * * from the exemption provided by Section 13 (a) (10) for various processing operations performed within the area of production" (349 U. S. at 267). While the court below erroneously assumed that the tobacco bulking operation is included in the Section 13 (a) (10) exemption, it is clear, on the contrary, that it was deliberately excluded. *Supra*, pp. 14–19.

ARGUMENT

All three respondents claim the benefit of the full exemption accorded to certain agricultural operations by Section 13 (a) (10) of the Fair Labor Standards Act (Sep. App., p. 3) on the ground that the Administrator's definition of "area of production"—as used in that Section—is invalid. In Point I, *infra*, we show that this contention has no merit, and that the definition which excludes respondent's operations from the exemption is fully valid. In Point II, *infra*, we urge, alternatively, that, irrespective of the validity of the Administrator's definition of "area of production", respondents are not entitled to

the Section 13 (a) (10) exemption because they do not fall within the other requirements of that provision. If we are correct in either of these arguments, the judgment below must be reversed as to respondent Budd which relies, in this Court, solely on Section 13 (a) (10). The other two respondents, King Edward and May, also rely on the general agricultural exemption in Section 13 (a) (6) (Sep. App., pp. 2-3), but we show in Point III, *infra*, that, *a fortiori*, that exemption is likewise inapplicable to the tobacco bulking operations involved here.

II. THE WAGE AND HOUR ADMINISTRATOR'S REDEFINITION OF "AREA OF PRODUCTION" PURSUANT TO SECTION 13 (a) (10) OF THE FAIR LABOR STANDARDS ACT IS VALID.

Section 13 (a) (10) of the Fair Labor Standards Act (quoted in full, Sep. App., p. 3) exempts from both the minimum wage and overtime requirements of the Act "any individual employed within the area of production (as defined by the Administrator), engaged in" specified activities on "agricultural or horticultural commodities."[7] The Administrator's definition

[7] Section 7 (c) (Sep. App., pp. 1-2) also provides that in the case of an employer engaged "in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations" the overtime provisions shall not apply "during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year."

provides that a plant is within the "area of production" if it is located (1) "in the open country or in a rural community" (which for "purposes of this section" "shall not include any city, town or urban place of 2,500 or greater population") and (2) within a specified mileage distance from the source of 95% of its commodities. (Sep. App., pp. 4–6).[5]

This administrative definition has now been in effect for nine years, and indeed is basically the same as one of the alternative definitions of "area of production" (the general vicinity plus rural community alternative) issued shortly after the enactment of the Act over 16 years ago. See *Addison* v. *Holly Hill Co.*, 322 U. S. 607 at 609–611. While this Court, in the *Holly Hill* case, held invalid the other alternative definition of the Administrator's earlier regulation, invalidity was predicated solely upon the non-geographic criterion of that alternative which placed a limitation on the number of employees that might be employed in an exempt establishment.[6] The mileage plus rural area alternative, which in basic

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[5] With respect to operations on tobacco the distance prescribed is 50 airline miles. Respondents' bulking plants concededly meet the mileage test but do not meet the "rural area" test inasmuch as they are located in a town with a population greater than 2,500. Quincy, Fla., has a population, according to the 1950 census, of 6,586 (RB 49).

[6] The Court voided the part of the original regulation which provided that, to be exempt, the establishment could not employ more than seven employees. 322 U. S. at 611, 618–619.

criteria parallels the redefinition here in issue, was not invalidated by this Court. On the contrary, the mileage aspect was specifically recognized as valid (322 U. S. at 610-611), and the Court found it unnecessary to pass on the rural area (sometimes called "population") criterion because that condition was concededly met. 322 U. S. at 610.[7] The comparable redefinition here in issue was held valid in both aspects by the Tenth Circuit three years ago in *Tobin* v. *Traders Compress Co.*, 199 F. 2d 8, which approved both the rural area and the mileage criteria, and this Court denied a petition for certiorari. 344 U. S. 909.

The redefinition, adopted after extensive consideration and full hearings, conforms to this Court's ruling in *Holly Hill* and employs only geographic criteria which take into account, insofar as consistent with the drawing of geographic lines, the relevant economic factors. Moreover, during the intervening nine years since the issuance of the redefinition Congress has repeatedly been advised of the redefinition and of the criticisms of it, and has declined to enact specific proposals to revise either the regulation or the statu-

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[7] The only two Courts of Appeals which have since ruled on the question, the Fifth and Tenth, have both recognized the validity of the mileage test. In addition to the *Tradiers Compress* decision cited in the text, and *Jenkins* v. *Durkin*, 208 F. 2d 941 (C. A. 5), a similar test was held valid by the Fifth Circuit prior to the *Holly Hill* decision, in *Fleming* v. *Farmers Peanut Co.*, 128 F. 2d 404.

tory provision under which it was issued. Indeed, Congress has refused to make any change despite repeated recommendations by the Administrator and the Secretary of Labor who have pointed out certain unavoidable inequities inherent in the solely geographic criteria adopted in the redefinition to accord with the statutory terms as construed in the *Holly Hill* decision. In view of these considerations, which are developed more fully below, we submit that the validity of the redefinition is not open to question.

A. THE DEFINITION ACCORDS WITH THE STATUTORY TERMS AND THIS COURT'S DECISION IN *ADDISON v. HOLLY HILL*, AND IS RESTRICTED TO GEOGRAPHIC CRITERIA WHICH TAKE INTO ACCOUNT, INSOFAR AS CONSISTENT WITH THE DRAWING OF GEOGRAPHIC LINES, THE RELEVANT ECONOMIC FACTORS

(1) The redefinition represents a most careful and deliberate effort by the Administrator to apply the guides enunciated in this Court's *Holly Hill* opinion. It was issued only after extensive investigation and conferences with various interested parties, and after public hearings conducted on behalf of the Administrator, at which testimony, recommendations, and representations were adduced by industry and employee representatives. In addition to the six formal hearings, numerous informal conferences were held throughout the country with representatives of labor and of the industries involved. Substantial economic data, including economic reports treat-

ing separate industries affected by the proposed definition, specifically covering the tobacco industry, were assembled by the Department of Labor. After all these studies were completed, the Administrator published detailed findings indicating the major considerations entering into the promulgation of the redefinition and explaining the manner in which he sought to apply the principles enunciated in *Holly Hill*. 3 CCH Labor Law Reporter, par. 23,282 (Sep. App., pp. 6–40).

The redefinition was thoroughly re-examined in extensive administrative hearings held in 1951, after it had been in operation for more than four years. At that time the complete records of the original hearings held in 1938–1940, as well as the records in the hearings held in 1944–1945 preceding the issuance of the redefinition, were reconsidered, in addition to some 800 pages of new evidence, 73 statements in lieu of personal appearance, 45 exhibits, and approximately 150 responses to the Administrator's request for proposed amendments to the definition. (See Report and Recommendations of the Presiding Officer, unpublished but available in the records of the Department of Labor). At this later hearing, six members of the cigar tobacco industry testified or submitted statements, including specifically representatives of the Budd and King Edward companies, respondents in the instant case. After

full consideration of all of this evidence, the Administrator concluded:

> The present definition accomplishes the statutory purpose more effectively than any definition proposed at the hearing. Changes in the present definition within the limitations imposed by the decision of the U. S. Supreme Court in the *Holly Hill* case would at best be only palliative in their effect. At worst, they would widen the existing areas of confusion and uncertainty and shift and intensify the inequitable effects. The only real and lasting solution to the problem is a legislative one. [19 F. R. 4482.][7]

(2) The objective of the redefinition, as stated by the Administrator in his findings (3 CCH Labor Law Reporter, par. 23,282; Sep. App., pp. 7 *ff*), was to meet the requirement of *Holly Hill* that the definition be in terms of "area" or "geographic bounds," taking into account the Court's explicit recognition that the Administrator's task was not a simple map-making task, but involved "complicated economic factors" which "the Administrator may properly weigh and syn-

[7] A significant fact developed by this latest hearing was the apparent general acceptance of the redefinition by the major industry groups affected. "Considerably less interest was evidenced in this hearing than in the previous hearings. Large segments of the major industry groups which employ approximately three-quarters of the employees who are affected by the definition" did not even appear at the hearing. See Findings of the Administrator, 19 F. R. 4482.

thesize" in delimiting the bounds of the areas. 322 U. S. at 613-616. Specifically, the Administrator is to designate "a zone within which economic influences may be deemed to operate and outside of which they lose their force" (*id.* at 614). The decision expressly recognized that there is a "choice of areas open to [the Administrator]", depending upon consideration of the pertinent economic factors (*id.* at 619); "Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter" (*id.* at 614). As stated in the majority opinion in *Trader's Compress, supra*, "from the *Addison* [*Holly Hill*] case we are clear that 'area of production' cannot be measured or delineated by the mere fact of production alone. If the task had been deemed that simple, Congress could have easily provided its own definition without resort to administrative implementation" (199 F. 2d at 10).

On the basis of his careful and exhaustive survey, the Administrator adopted two basic criteria, both formulated in terms of geographic area but also taking into account the complicated economic factors. The redefinition omitted the number of employees limitation which this Court found objectionable in *Holly Hill, supra*, p. 22, and prescribed only that the place of employment be located within a rural area (*supra*, p. 22) and within a specified mileage distance from the

source of at least 95% of its commodities (*supra*, p. 22).

The requirement that the employment be within a rural area, which is the sole condition here in issue, was based upon the plain Congressional intent to distinguish "between rural communities and the urban centers." (Sep. App., p. 8; see 322 U. S. at 615). This problem was approached directly by drawing the bounds of the area of production so as to exclude, insofar as was feasible in a definition *of general application*, the urban industrial centers without excluding the area of agricultural production. The Administrator's findings state: "An analysis of all the available data indicated * * * that while the size of a town is not a perfect criterion of its urban or industrial character, it is nevertheless the best available test, and leads to results which in general are accurate enough to warrant its adoption" (Sep. App., p. 20). The results reached by other Government agencies having long experience in distinguishing between rural and urban areas were heavily relied upon in choosing the 2,500 figure (Sep. App., pp. 21–23). As the industrial areas of cities were found generally to extend at least short distances beyond their political boundaries, a mileage tolerance for this test was found necessary to avoid discrimination not based on substantial economic differences (Sep. App., pp. 23 *ff*).

It is an indisputable fact that agricultural production of any significance is usually carried on in rural areas and not in urban centers. This is one of the "economic factors" which the Administrator could scarcely ignore, and which this Court directed him to consider. Even under the view of the court below, that the Administrator is restricted to defining the geographic bounds of the land area within which the particular commodity is actually produced, it would be difficult to find fault with that part of the definition which merely excludes the centers of urban life. This aspect of the definition accords with the legislative history, which, as this Court noted in *Holly Hill*, shows that Congressman Bierinann, who sponsored the statutory provision in question, indicated "plainly enough" that he had in mind differences between establishments in "rural communities and urban centers." 322 U. S. at 615. Certainly, the "rural area" test cannot be regarded as arbitrary or unrelated to the factors the Administrator was directed to consider or the ends he was to attain. This element was squarely within the realm in which "Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter" in the exercise of his "experienced and informed judgment" (322 U. S. at 614).

Respondents are frank to admit that "The House debates evidence some concern that plants located in large cities and in industrial and urban

centers should not enjoy the exemption, and there should be a labor differential between the large city and the little town" (Br. in Opp., p. 30). And they observe that a definition which excludes establishments located in a "city of over 30,000" "would appear reasonable" (*ibid.*, p. 27). Thus, respondents do not seem to question that the size of a town is a proper consideration to be applied in drafting a definition of "area of production." They are complaining only that the line was drawn too rigidly by the Administrator because it did not exempt the city in which their plants are located. Their quarrel, then, is not with the general standard employed by the Administrator but with his judgment in applying that standard.

But the *Holly Hill* decision clearly recognizes that this is the very task left by Congress to the "experienced and informed judgment" of the Administrator, rather than "to the contingencies and inevitable diversities of litigation." In upholding the Administrator's comparable line prescribed for the mileage standard, this Court quoted Mr. Justice Holmes, as follows (322 U. S. 607, 611):

> Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it pre-

> cisely, the decision of the [Administrator] must be accepted unless we can say that it is very wide of any reasonable mark."

As the Administrator's findings point out (Sep. App., pp. 22–23), the choice of the 2,500 town as the dividing line between "rural" and "urban" is supported by the long-standing usage of the Bureau of the Census and other Government agencies, by private studies comparing facets of rural and urban life, by certain Congressional enactments, and by national statistics as to the handling and processing of agricultural and horticultural commodities. Against this background, the Administrator's choice of 2,500, rather than some higher figure as respondents would desire, cannot be said to be "very wide of any reasonable mark" (*supra*).

The only other Court of Appeals to have considered the present regulation, the Tenth Circuit in the *Traders Compress* decision, *supra*, sustained it as one which is "based upon relevant economic factors" and which "does bear a reasonable relationship to the purposes of the exemption, and is therefore not arbitrary and capricious." Specifically on the "rural area" test, the court stated: "From an analysis of available data,

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[2] Cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 209; *Securities and Exchange Commission* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 125; *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143.

the Administrator recognized that the size of a town is not a perfect criterion of its urban or industrial character, but it was adopted as the best available test, and leads to results generally accurate" (199 F. 2d at 11). "Having in mind that the primary object of the definition is to attempt to arrive at an economic balance between rural and industrial labor conditions * * * we cannot say that populations of cities and towns is not a relevant economic factor in determining whether labor conditions are predominantly rural or industrial" (*ibid.*).

B. CONGRESS HAS, IN EFFECT, APPROVED THE ADMINISTRATOR'S DEFINITION

If there were any doubt of the validity of the Administrator's redefinition, it has been eliminated, we submit, by Congressional approval subsequent to its issuance. Congress has repeatedly been advised of the redefinition and of the criticisms of it, and has on several occasions declined to enact specific proposals to revise the regulation and the statutory provision under which it was issued. Not only have interested employers criticized the definition and proposed specific amendments to Congressional committees,[7] but also the

[7] The attorney who represented the Traders Compress Company appeared before both the Senate and House Committees and made the same arguments against the Administrator's definition, including a direct attack upon the "rural area" test, that he later advanced before the Tenth Circuit in *Traders Compress*. See Hearings before a Subcommittee of the Committee on Labor and Public Welfare on S. 58, S. 67,

Administrator and the Secretary of Labor on numerous occasions have recommended revision of Section 13 (a) (10) in order to alleviate certain recognized competitive inequities and administrative difficulties inherent in any purely geographic definition of "area of production." This recommendation has been frequently repeated by the Administrator and the Secretary of Labor, both through annual reports to Congress,[11] and in appearances before Congressional committees considering the subject.[12]

The aftermath of the testimony and proposals before the Congressional committees considering the 1949 amendments to the Act was a recommendation by the Senate Committee for repeal of the minimum wage exemption altogether (Senate Report No. 640, 81st Cong., 1st sess., July 8, 1949, p. 2, Sep. App., pp. 133, 134). The bill was passed

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S. 92, S. 105, S. 190, S. 248, and S. 653, 81st Cong., 1st Sess. (1949), pp. 658–765; and Hearings before the Committee on Education and Labor on H. R. 2033, 81st Cong., 1st Sess. (1949), Vol. 1, pp. 872–887, 942–945.

[11] Illustrative are the 1948 Annual Report of the Wage and Hour and Public Contracts Divisions, pp. 123–134, and the 1950 Annual Report of the Secretary of Labor, pp. 281–285.

[12] For example, see the testimony of the Administrator before the Senate and House Committees considering the 1949 Amendments of the Act, Hearings before the Committee on Education and Labor on H. R. 2033, 81st Cong., 1st Sess. (1949), p. 56; Hearings before a Subcommittee of the Committee on Labor and Public Welfare on S. 49, S. 151, S. 160, S. 161, S. 557, S. 731, S. 1048, S. 1076, S. 1288, S. 1400, S. 1404, S. 1509, S. 2062, and S. 2386, 80th Cong., 2nd Sess. (1948), pp. 40–42, 82–83, 165.

by the Senate, however, retained the exemption in its original form (95 Cong. Rec. 12435–12436, 12583). See Sep. App., pp. 133–153. Although the House bill would have amended the exemption to transfer authority to define "area of production" from the Administrator to the Secretary of Agriculture, this was abandoned in conference and the bill, as enacted, left the "area of production" provision unchanged (95 Cong. Rec. 14933, Sep. App., pp. 133, 147). The rejection of this proposal is particularly significant here in view of the respondents' reliance upon the definition of "production area" by the Secretary of Agriculture (see Br. in Opp., pp. 27–28). Obviously, if Congress had intended that the Administrator adopt the definition of the Secretary of Agriculture, it would have been a simple matter to have stated so expressly or to have adopted the House amendment.

Furthermore, Congress has had actual knowledge of the redefinition practically since it was issued. In February 1947, the redefinition and the Administrator's findings were both called to the attention of a House subcommittee considering the Portal-to-Portal Act of 1947.[13] A number of witnesses appearing before this subcommittee testified that the "rural area" test of the redefinition would remove from the "area of production" many employers who would be within it under the definition invalidated in *Holly Hill*. En-

[13] See Hearings Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess., on H. R. 584 and H. J. Res. 91, pp. 210–221.

doubtedly, it was this testimony that led to the enactment of Section 12 of the Portal-to-Portal Act of 1947, 29 U. S. C. 251, 261, Sep. App., pp. 3–4, which specifically referred to the redefinition in providing exemption from liability that might have been incurred through its retroactive operation.

Not only did Congress thus decline to modify the Administrator's regulation or revise the statutory language, but it affirmatively approved existing administrative regulations by providing in Section 16 (c) of the Fair Labor Standards Amendments of 1949, 63 Stat. at 920, that "any order, regulation, or interpretation of the Administrator of the Wage and Hour Division * * * in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect * * * except to the extent that any such order, regulation [etc.] * * * may be inconsistent with the provisions of this Act * * *." This legislative action was taken, as we have indicated, in the face of repeated petitions for revision of the "area of production" requirements by both interested employers and the officials charged with enforcement of the Act. It would seem to follow, *a fortiori* from this Court's decisions, that Congress has confirmed and ratified the Administrator's regulation redefining "area of production." See *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16–17; *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 270.

II. IRRESPECTIVE OF THE VALIDITY OF THE DEFINITION OF "AREA OF PRODUCTION," RESPONDENTS' BULKING PLANT EMPLOYEES DO NOT MEET THE OTHER REQUIREMENTS FOR EXEMPTION UNDER SECTION 13 (a) (10) BECAUSE THE PROCESSING OPERATION IN WHICH THEY ARE ENGAGED IS NOT ONE OF THOSE SPECIFIED IN THAT SECTION AND IS NOT LIMITED TO "AGRICULTURAL OR HORTICULTURAL COMMODITIES"

The operations enumerated in Section 13 (a) (10) are:

> * * * handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market * * *.

The section thus does not exempt every operation which in a broad sense may be necessary for marketing agricultural products, as the court below erroneously assumed. On the contrary, the exemption is limited to individuals engaged only in the specifically enumerated operations on "agricultural or horticultural commodities." Such specificity precludes any implication that the exemption applies to processing operations not expressly mentioned. *Addison* v. *Holly Hill*, 322 U. S. at 617; *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 517; *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U. S. 755, 759–760, 764–766; *Phillips Co.* v. *Walling*, 324 U. S. 490, 493. Tobacco bulking is not only *not* one of the specifically enumerated operations, but *bulked* tobacco is *not* an "agricultural or horticul-

tural" commodity within the meaning of that term in Section 13 (a) (10). The legislative history furnishes conclusive evidence that tobacco processing was deliberately omitted from this exemption—an omission which this Court has recognized as most significant in determining the application of the "agriculture" exemption provided by Section 13 (a) (6), as well as of Section 13 (a) (10). See *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 267–268. The decision below holding that the bulking of tobacco is within the scope of the exemption is incorrect, therefore, irrespective of the validity of the definition of "area of production."

(1) The tobacco bulking process is not specifically enumerated in Section 13 (a) (10), as are "ginning," "pasteurizing," "compressing" and "canning" which are forms of industrial or quasi-industrial processing that may change the natural state of the commodity in a way possibly analogous to tobacco bulking. "Drying" is also specifically enumerated, but that term, by any recognized definition, is limited to simple dehydration or removal of moisture.

In sharp contrast, the bulking process is described by experts as a "very careful and precise" operation which is "largely a process of slow combustion" involving carefully controlled regulation of heat and humidity (RK 24–25). Contrary to the contention made by respondents below, bulking is not a simple dehydration opera-

tion. Indeed, it involves more addition than it does removal of moisture. Most of the moisture has been removed in the preliminary drying process in the barns on the farm before the tobacco reaches the bulking plant (RK 23–24, 30; RB 148). See Statement, *supra*, pp. 4–5. The drying operation which takes place in the barns reduces the content from between 80 and 85 percent to between 25 and 10 percent, which is about the same moisture content of the tobacco when the bulking process is completed (*ibid.*). Thus, while the operation in the barns is essentially a drying operation, the bulking process requires much more carefully conditioned and prolonged treatment with the use of the extensive industrial equipment (see Statement, *supra*, pp. 5–8). It is a processing more comparable to the "redrying" process applied generally to non-cigar types of tobacco.[14] This "redrying" process, usually performed on non-cigar type tobacco, like the bulking process on cigar tobacco, is the first processing of the tobacco after it leaves the farm.[15] The inapplicability of the Section 13 (a) (10) exemption to such "redrying" plants has long been accepted by the industry.

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[14] Yearbook of Agriculture, 1954, United States Department of Agriculture, pp. 440–442; United States Department of Agriculture Circulator No. 249, *American Tobacco Types, Uses, and Markets* (1942), pp. 61, 69–70, 81–86.

[15] *Ibid.*

The most comprehensive term enumerated in the section is "preparing" and it is expressly limited to "preparing in their raw and natural state." From the legislative history it is clear that this term contemplates only such simple operations as washing the raw commodity, not "processing" the commodity into an industrial product. See the colloquy among Senators Barkley, Schwellenbach, and Black, 81 Cong. Rec. 7877–7878, Sep. App., pp. 53–65.

It seems equally apparent that the other general terms, "handling," "packing" or "storing," also refer to simple non-processing operations, such as loading and unloading commodities or weighing or moving them from one place to another, placing them in containers or in storage rooms, and preparing activities which do not substantially change the raw or natural state of the commodities. Certainly, these terms do not include the operations here involved which require "a tremendously large amount of valuable and expensive equipment" and "above all, the ability and knowledge of the handling gained only through experience" (RB 42), and which result in "a decided decrease in amino nitrogen and an increase in ammonia," "substantial losses" of citric and malic acids, a modification of the "physical constants of the ethereal oils," a loss in nicotine content "commonly ranging from 15 to 25 percent or more of the total originally

present," a reduction of the starch or sugar content of the tobacco and a substantial loss in dry matter (RK 27-28). See, also, the Statement, *supra*, pp. 6-7.

Moreover, like the sugar milling in *Maneja* v. *Waialua Agricultural Company*, 349 U. S. 254, 268; this tobacco bulking process is more of an "industrial" or "manufacturing operation" in the course of which the tobacco is very substantially "changed from its 'raw or natural state'" into an industrial product and is, therefore, no longer an "agricultural or horticultural" commodity within the meaning of Section 13 (a) (16). Whether or not the term "raw or natural state" grammatically modifies all of the preceding operations in Section 13 (a) (10), as the courts have held,[*] the context in which the phrase "agricultural or horticultural commodities" is

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[*] See *Puerto Rico Tobacco Marketing Coop. Ass'n.* v. *McComb*, 181 F. 2d 697, 701 (C. A. 1); *Wyatt* v. *Hilleville Hijalja Mills*, 106 F. Supp. 624, 631 (S. D. Cal.), reversed in part (on other grounds) and remanded for further findings, 12 W. H. Cases 635, decided August 31, 1955 (C. A. 9).

Earlier drafts of this exemption plainly indicate the intent to qualify all of these terms by the "raw or natural state" phrase. The Senate version of the bill which finally became the Act (S. 2475), passed on July 31, 1937 (81 Cong. Rec. 7957), included as Section 2 (a) (19) the provisions of the Schwellenbach amendment which added to the definition of agriculture the following:

"The term 'person employed in agriculture' as used in this Act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production

used, as well as the relationship of this exemption to other exemptions for processing of such commodities (notably Section 7 (c)), (see *infra*, pp. 46–48), demonstrate that the "handling," "packing," "storing," and "preparing" operations, referred to in Section 13 (a) (10), all relate to the natural commodity prior to its industrial processing.

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engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state."

While this provision is clear enough upon its face, Senator Schwellenbach made it unmistakably plain in Senate debate that he intended to restrict his proposed exemption to operations upon fresh fruits or vegetables in their "raw or natural state" (81 Cong. Rec. 7676-7678, 7940, Sep. App. pp. 53-65). Also see 81 Cong. Rec. 7656-7658, 7660, in which a similar amendment was debated along the same lines.

The House Committee on Labor approved and reported the bill with this provision intact (S. 2475, as reported to the House on August 6, 1937, in House report No. 1452, 75th Cong., 1st Sess.) and it was retained in the same form through many revisions of the bill. For examples, see Section 2 (a) (9) of House Confidential Committee Print of November 26, 1937, 75th Cong., 2nd Sess.; Section 2 (a) (29) of House Confidential Committee Print of December 7, 1937; Section 2 (a) (20) of House Committee Print of December 14, 1937. Section 2 (a) (20) of the bill, recommitted to the House on December 17, 1937, changed the provisions only slightly to read as follows:

"The term 'person employed in agriculture' * * * shall include persons employed within the area of production engaged in preparing, packing or storing agricultural commodities in their raw or natural state * * *."

The ambiguity caused by the location of the phrase "raw or natural state" in later drafts of this provision appears to have been an inadvertent result of amendments inserting other specified processes ("ginning," "compressing," "pasteurizing," and "drying") in addition to the operations included in earlier drafts of the bill.

(2) That tobacco processing was, specifically and deliberately, omitted from both the Section 13 (a) (10) exemption and the general agricultural exemption (Sections 3 (f), 13 (a) (6)) is conclusively confirmed by the legislative history. Specific proposals to include tobacco warehouse employees within these exemptions were repeatedly rejected both in the House and in the Senate. Senator Reynolds of North Carolina proposed that the agriculture exemption be amended by adding the following: "The provisions of this act shall not apply to tobacco warehouses, their employers or employees." He stated that the reason for this proposal was that the North Carolina tobacco warehouses were purely seasonal, operating only for a period of 3 or 4 months a year. 81 Cong. Rec. 7878–7879 (Sep. App., pp. 101, 106). Senator Barkley objected to the proposal on the specific ground that many tobacco warehouses also engaged in processing, such as prizing, stripping and stemming "during almost the whole year," and Senator Black objected on the ground that other provisions of the Act adequately took care of exemptions for seasonal activities. *Ibid.* 7879–7880 (Sep. App., pp. 104–106, 109–110). The proposal was rejected. *Ibid.* 7887 (Sep. App. 119).

A somewhat similar proposal by Representatives Barden and Cooley of North Carolina, limited to "persons employed in connection with the

selling of tobacco in auction warehouses", was likewise rejected. 82 Cong. Rec. 1783 (Sep. App., pp. 119–122). Representative Cooley then made a proposal for exemption of tobacco auction warehouses from the overtime provisions only, pointing out that "we were defeated when we attempted to exempt them from the wage provision." 82 Cong. Rec. 1804–1805 (Sep. App., pp. 122–124). This proposal, *providing only an exemption from the overtime provisions of the Act*, was agreed to. *Id.* 1805 (Sep. App., p. 124). A final attempt was subsequently made by Representative Cooley to secure the wage exemption for tobacco auction warehouses by an amendment to the section "employee employed in agriculture," which was the forerunner of Section 13 (a) (10) of the Act. This proposal was also rejected. 83 Cong. Rec. 7408–7410 (Sep. App., pp. 125–130). And even the proposal to exempt the tobacco auction houses only from the overtime provisions was finally rejected. *Ibid.* 7428–7429 (Sep. App., pp. 130–133).[17]

It is significant that even these defeated proposals did not go so far as to propose exemption for tobacco processing operations. On the contrary, Senator Reynolds expressly stated that it

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[17] The earlier amendment, which had previously been passed by the House (82 Cong. Rec. 1806), had been omitted by the Committee from the bill reported after recommitment (Sep. App., pp. 124–125).

is not my intent" to exempt the type of tobacco warehouse described by Senator Barkley in which processing operations were carried on "more or less year round," but "merely to exclude tobacco warehouses that are engaged in what may be called seasonal work, from 2 to 3 months in the year" when they simply received and immediately sold the tobacco brought in by the farmers. 81 Cong. Rec. 7879 (Sep. App., pp. 104, 106). And he readily accepted an amendment to his proposal which would limit it to "where the employment is seasonal in character." *Ibid.* Similarly, the proposals in the House were limited to auction warehouses which Representatives Barden and Cooley emphasized engaged in "entirely seasonal" work which "only lasts 3 or 4 months, at the most, in the fall of the year," and involves simply labor employed to assist the farmers, "who come in at all hours of the night, and day, too, as far as that is concerned, to unload their tobacco cargoes." 82 Cong. Rec. 1783, 1805 (Sep. App., pp. 120–121, 123); 83 Cong. Rec. 7428 (Sep. App., p. 131).

Further compelling evidence of the intent to exclude tobacco processing from the complete exemption for agricultural operations—embodied in Sections 13 (a) (6) and (13) (a) (10)—is apparent from the outcome of the proposals to exempt cotton ginning and compressing. These proposals were usually made concurrently with

the proposals to exempt tobacco warehouses. 81 Cong. Rec. 7879–7887. (Sep. App., pp. 106–108, 119); 82 Cong. Rec. 1785, 1806; 83 Cong. Rec. 7421. As finally enacted, Section 13 (a) (10), the correlative of the general agriculture exemption in Section 13 (a) (6), expressly mentions "ginning and compressing," whereas neither Section 13 (a) (10) nor any other section of the Act specifically refers to tobacco processing operations."

It is also clear that the minimum wage exemptions for agricultural activities were deliberately designed to *exclude* "processing" generally. Both Senator Schwellenbach and Representative Biermann, who sponsored the exemptions which were later incorporated in Section 13 (a) (10), took pains to point out that their proposals did not include "processing." Senator Schwellenbach stated specifically, "I did not include 'processing' * * * I have tried to limit the amendment to what I consider purely agricultural operations" (81 Cong. Rec. 7876). When an operation "becomes processing," he explained, it would not

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[1] The seasonal exemption, which Senator Reynolds was sponsoring, appears to have been taken care of by the "first processing" exemption and by the exemption for industries found to be "of a seasonal nature," *from the overtime requirement only*, in Sections 7 (c) and 7 (b) (3), respectively, which, we submit, "marks the outer limit of congressional concession to this type of processing." See *Mitchell v. Waialua Agricultural Co.*, 349 U. S. at 269.

qualify for exemption under this proposal, because "there is no inclusion of processing in the amendment." *Ibid.* 7878 (Sep. App., p. 64). Similarly, Representative Biermann, whose later and somewhat broader proposal was substantially adopted in Section 13 (a) (10) as enacted (83 Cong. Rec. 7401, Sep. App., p. 91), pointed out specifically that he had deleted the word "processing" from his original proposal: "In an amendment I inserted in the RECORD yesterday I included the word 'processing.' *I call attention to the fact that in the pending amendment this word is stricken out.*" *Ibid.*, emphasis added.

It is thus evident that processing operations, except for those specifically enumerated (*i. e.* ginning, compressing, pasteurizing, and canning), were deliberately excluded from the minimum wage exemptions for agriculture and agricultural operations.

(3) Further confirmation of the purpose to exclude processing generally from the agricultural minimum wage exemption may be found in the Section 7 (c) exemption (Sep. App., pp. 1–2), from the overtime requirements only, of "first processing" of agricultural commodities. As this Court recognized in the *Wirtz* case (349 U. S. 254), and as the Courts of Appeals have long held, the various exemptions for operations related to "agriculture" "are *in pari materia* and must be construed together to form a consistent whole, if possible" (*Borella* v. *Gonzalez*, 417 F. 2d 11, 17

(C. A. 1)). Also, see *Stratton* v. *Farmers Product Co.*, 134 F. 2d 825 (C. A. 8)). Section 7 (c), which together with Section 13 (a) (10) establishes an integrated pattern of exemption for activities closely related to agriculture, provides a 14 workweek exemption from the overtime provisions of the Act for "the *first processing*, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations." [Emphasis added] (Sep. App., pp. 1-2). Section 13 (a) (10), on the other hand, grants a *complete wage and hour* exemption to "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing * * * drying, preparing in their raw or natural state * * * agricultural or horticultural commodities for market." Since both sections apply to "agricultural or horticultural commodities" and both are restricted to employees employed within the "area of production (as defined by the Administrator)," the significant difference in language lies in the term "first processing" in Section 7 (c).

It seems plain that the general terms "handling," etc., used in Section 13 (a) (10), do not include any operations (except those specifically named) which properly may be classified as "first processing." Otherwise, the limited exemption in Section 7 (c) becomes meaningless in view of

the complete exemption in Section 13 (a) (10). See *Bowie* v. *Gonzalez*, *supra*, 117 F. 2d at 18–19. The bulking process here would constitute "first processing" under Section 7 (c), rather than any of the operations listed in Section 13 (a) (10).

(4) The Administrator's interpretation that the tobacco bulking process is not included in Section 13 (a) (10), like the Administrator's regulation defining "area of production" (see *supra*, pp. 32–35), has been ratified by subsequent legislative developments. The interpretation was repeatedly stated and published long before the enactment of the 1949 Amendments to the Act.[19]

[19] While there may have been some confusion in the original interpretation issued in August 1939 (Interpretative Bulletin No. 14, Wage and Hour Manual, 1940, p. 180, pars. 20, 25, 32 and 33), subsequent published interpretations made it clear that tobacco bulking was not regarded as an operation within Section 13 (a) (10). In addition to the interpretation quoted in the text see, for example, *Area of Production; Tobacco*, United States Department of Labor, Wage and Hour and Public Contracts Divisions (December 1944), p. 21:

"Since fermenting is not one of the operations named in section 13 (a) (10), the employees of packers of cigar tobacco are not eligible for the exemption in workweeks in which they are engaged in fermenting tobacco, and since fermented tobacco is not an agricultural commodity, the exemption does not apply to those employees engaged in the handling, grading and packing of fermented tobacco. * * * Similarly, employees redrying tobacco for storage and fermentation by their employer are not within the exemption. * * *"

Also see Release M–12 of Wage and Hour and Public Contracts Divisions, "*Area of Production*" As *It Applies To Tobacco Industry* (February 28, 1947).

and was clarified beyond doubt at the time of the issuance of the regulation amending "Area of Production As Used in Section 7 (c) of the Fair Labor Standards Act" on November 18, 1948 (13 F. R. 7347). That regulation stated specifically with reference to the tobacco bulking process:

> The amendments * * * are intended, among other things, to make it clear that in Puerto Rico, as elsewhere, *bulking of leaf tobacco, which characteristically involves processing operations not mentioned in section 13 (a) (10)* of the Fair Labor Standards Act, *will not provide* a basis for exemption under that section. * * * [Emphasis added.] [3 CCH Labor Law Reporter (4th ed.), par. 23,281.]

This clear administrative construction of the exemption was outstanding at the time of the enactment of the Fair Labor Standards Amendment of 1949 (October 26, 1949) and is, therefore, within the scope of Section 16 (c) of that Act which explicitly kept "in effect" outstanding interpretations of the Administrator or the Secretary, not inconsistent with those amendments. See *supra*, p. 35.

III. THE SECTION 13 (A) (6) AGRICULTURAL EXEMPTION, ADMITTEDLY INAPPLICABLE TO RESPONDENT BUDD'S PLANT, IS ALSO INAPPLICABLE TO THE OFF-THE-FARM BULKING PLANT OPERATIONS OF RESPONDENTS KING EDWARD AND MAY BECAUSE THE BULKING PROCESS IS NOT "AGRICULTURE" AS DEFINED IN SECTION 3 (F)

Agriculture, as defined in Section 3 (f) of the Act, includes

> farming in all its branches and among other things includes the cultivation and tillage of the soil * * * the production, cultivation, growing and harvesting of any agricultural or horticultural commodities * * * and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

The Fifth Circuit's ruling that the bulking plant employees of respondents King Edward and May are exempt, under Section 13 (a) (6) (Sep. App., pp. 2–3), as engaged in "agriculture" (as above defined) is not only inconsistent with this Court's subsequent decision in *Mancja* v. *Waialua Agricultural Co.*, 349 U. S. 254, but is in direct conflict with the specific intent of Congress to exclude tobacco processing from this exemption, as is unmistakably made clear by the legislative history.

Broad as the Act's definition of "agriculture" is, it nevertheless was designed to exempt only those employees engaged in "genuine, bona-fide farming activity" (81 Cong. Rec., July 27, 1937, pp. 7656–7657). As the Court observed in *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 260, although "[the] exemption was meant to embrace the whole field of agriculture * * *" "[n]evertheless, no matter how broad the exemption, it was meant to apply only to agriculture."

(1) The legislative history summarized *supra* (pp. 42–46) with reference to the Section 13 (a) (10) exemption is equally applicable to the 13 (a) (6) exemption. In the earlier drafts of these exemptions, the two were included within the same provision and they were invariably considered and debated together. This Court pointed out in *Waialua* that the Congressional scheme in these two exemptions was to equalize the status of large and small farmers, both provisions being equally concerned with "marking the dividing line between processing as an agricultural function and processing as a manufacturing function" (349 U. S. at 268). Thus, the omission of a processing operation from Section 13 (a) (10) is most significant evidence that Congress "concluded that it also fell outside the agriculture exemption" (*Ibid.*).

No speculation or rationalization is necessary to determine that Congress concluded that tobacco

processing fell outside the agriculture exemption. The specific proposals to exempt tobacco warehouses from both the minimum wage and overtime requirements of the Act, which were repeatedly rejected, were offered as amendments both to the definition of "agriculture" and to the provision which subsequently became Section 13 (a) (10) (see *supra*, pp. 42–46). The rejection of these specific proposals is, we submit, conclusive evidence that Congress deemed tobacco processing outside the scope of both exemptions.

The *Wirtz* decision recognized that the agricultural exemption in Section 13 (a) (6) certainly extends *no further* than the operations covered by the corresponding exemption in Section 13 (a) (10), which was intended to grant an exemption somewhat broader in certain respects than that in Section 13 (a) (6). (349 U. S. at 267–8.) The statutory language defining "agriculture", on its face, suffices to exclude processing operations. It is noteworthy that, with all the terminology included in the definition, the word "processing" is nowhere used, and indeed appears to have been scrupulously avoided. The use of the word "practices" in the second branch of the definition of "agriculture" is itself indicative of the deliberate intent to limit the exemption to ordinary farming activities. "Practices" suggests activities ordinarily carried on by farmers as an incident to their ordinary farming,

and not distinct, highly industrialized processing operations. This is confirmed by the fact that the original suggestion of a definition of agricultural labor, submitted by a representative of the International Apple Association, included the word "processing." See Joint Hearings on S. 2475 before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess., June 2, 1937 to June 22, 1937, p. 1696; Sep. App., p. 44. But the bill reported by the Senate Committee on July 8, 1937, significantly omitted any reference to the word "processing," and substituted the provision on "practices." That this choice of language was meaningful is indicated by the legislative history discussed *supra*, pp. 42-46, with reference to omission of the word "processing" from the corresponding exemption in Section 13 (a) (10).

(2) The Fifth Circuit's opinion, which was rendered prior to this Court's decision in *Wialua*, relies solely on two factors which, under *Wialua*, plainly do not determine the applicability of the agriculture exemption. These two factors are (i) that King Edward and May, at the plants in question, processed tobacco leaf "grown exclusively on their farms", and (ii) that the bulking process is "essential for the marketing" of this type of tobacco. The accuracy of the court's factual assumption on the second fac-

tor is highly questionable." But even if factual accuracy is assumed, both of these factors were at least equally present in *Waialua*. The agriculture exemption was held inapplicable to Waialua's sugar processing plant (349 U. S. at 264–270) despite the fact that Waialua, like the plants of King Edward and May, processed only its own grown agricultural commodity, and also despite the fact, as this Court expressly noted, that the commodity (unmilled sugar cane) is "unmarketable as such" and "must be processed within a few days of harvesting or serious spoilage will result" (349 U. S. at 257, 265).[21]

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[20] The assumption that the bulking process is "essential for the marketing" of Type 62 tobacco appears for the first time in the opinion of the Fifth Circuit and was not found as a fact by the District Court. Although the evidence on this aspect of the case is not too clear, it does show without contradiction that King Edward purchased from other farmers large quantities of the tobacco which it bulked at other plants. As pointed out in the Statement (*supra*, p. 9), King Edward bulked approximately 595,901 pounds of Type 62 tobacco in its overall operations during 1951, of which 534,967 pounds had been purchased from other persons who had grown it. In 1950, King Edward purchased tobacco grown by others in the total amount of $744,262.39, whereas the farm costs for growing tobacco on its rented farms only amounted to $182,769.80. This evidence strongly indicates that Type 62 tobacco not only can be, but often is, marketed by the farmer in an uncured state prior to bulking.

[21] Indeed, the sugar milling in *Waialua* was much more essential for marketing of the crop, and much closer in both time and sequence to the actual farming, than is the tobacco bulking in the instant case. For while "unmilled sugar cane is highly perishable and unmarketable as such" (349 U. S. 254, 265), many small tobacco growers apparently sell

On the other hand, the factors—ignored by the court below—which this Court held in *Wiialua* to be most pertinent and significant are equally, if not more, determinative in the instant case. One of the elements especially emphasized by this Court in *Wiialua*, and not considered below, is "what is ordinarily done by farmers with regard to this type of operation," the pertinent consideration being "not the proportion of millers who grow their own cane but the percentage of farmers who engage in milling" (349 U. S. at 265, 267). The undisputed facts in the present record show that tobacco farmers do not ordinarily perform the bulking operation. Of the approximately 300 farmers who grow Type 62 tobacco in Florida, only 9 maintain and operate their own bulking plants (see Statement, *supra*, pp. 7–8).[2] The remaining farmers have their crop processed by others. Thus, Budd, which is an independently operated plant, processed tobacco grown

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their tobacco before it has been bulked to processors such as Budd and King Edward. Moreover, while unmilled sugar cane "must be processed within a few days of harvesting or serious spoilage will result," the tobacco in the instant case after harvesting undergoes preliminary barn curing while still on the farm. It is not until after this preliminary barn curing on the farm that the tobacco is taken from the farms to the bulking plant. The bulking process itself, once undertaken, requires from "6 to 12 months or longer" (RK 25; RB 43, 49).

[2] Only 5 of these 9 are engaged exclusively in the processing of their own grown tobacco. The other 4 process tobacco grown by others as well as their own (RK 84A).

by 52 small farmers (RB 148). And King Edward purchased from other farmers almost 60% of the total poundage bulked at its plants during 1951; the cost of the crop purchased from others represented about 68% of its total cost for the 1950 crop processed at its three plants (RK 13-14). See *supra*, pp. 8-10, 54). These figures are a natural result of the fact, shown by the evidence, that the expensive facilities and equipment, and the skill, the time and space, needed for this complex process, prevent the ordinary farmer from performing this bulking operation for himself.

Another factor which the *Waialua* decision emphasized as of particular significance was the "industrial" nature of the operation which "transforms" the commodity "from its raw and natural

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[3] The proportion of farmers who do not perform this type of processing is even greater in the tobacco industry generally (including non-cigar types). Thus, although there was a total of 363,713 farms in the United States growing tobacco in 1954 (latest available figures from United States Department of Agriculture, CSS, Tobacco Division, January 20, 1955), there were only 163 redrying plants in the United States. United States Department of Commerce, Bureau of the Census, *Census of Manufactures*, 1947, Vol. II, p. 119. The redrying plants perform the first off the farm operations on non-cigar types of tobacco comparable to the bulking of cigar tobacco. Like the bulking plants, most of the redrying plants are not owned by a grower-processor but are independently owned and operated. Yearbook of Agriculture, 1954, United States Department of Agriculture, pp. 110-112; United States Department of Agriculture Circular No. 239, *American Tobacco Types, Uses, and Markets* (1942), pp. 61, 69-70, 81-86.

state * * * resulting in such a change [which] is more akin to manufacturing than to agriculture" (349 U. S. at 265, 268). The instant case is indistinguishable from *Wyatlia* in this respect also. There is no question that the bulking plant operation is a highly industrialized process which greatly changes the "raw and natural state" of the freshly cured tobacco that leaves the farm. The tobacco as it comes from the farm is "not fit for human use" (RK 22). The bulking process which converts it into a usable form is not only time-consuming, but substantially changes its physical properties and chemical content. "Tobacco is improved in many ways by this processing but the outstanding effects are development of the desired odor and aroma and elimination of the rawness or harshness and in part the bitter taste which characterize all freshly cured leaf. The color of the leaf usually is improved * * *. The gum of the leaf partially loses its sticky properties. Usually the combustibility of the tobacco is improved. Depending on the extent of the fermentation the elasticity may be reduced and in extreme cases the leaf tissues may be greatly weakened" (RK 22-23). Other changes brought about by the bulking process are "a decided decrease in amino nitrogen and an increase in ammonia," "substantial losses" of citric and malic acids, a modification of the "physical constants of the 'ethereal oils,'" a loss in nicotine content "commonly ranging from 15 to 25 percent

or more of the total originally present," "a reduction of the starch or sugar content of the tobacco and a substantial loss in dry matter (RK 27–28). The tobacco after undergoing these extensive changes is no longer in its "raw and natural state." See the Statement, *supra*, pp. 6–7.

In sum, the bulking operation, which takes from 6 to 12 months after the tobacco leaves the farm and which requires "a tremendously large amount of valuable and expensive equipment" and "above all, the ability and knowledge of the handling gained only through experience" (RB 42), and which results in such decided changes in the "raw and natural" state of the tobacco is—like the sugar milling in *Waialua*—clearly an "industrial" operation "more akin to manufacturing than to agriculture." 349 U. S. at 265.

The final significant factor which establishes the parallel between this case and the Waialua sugar mill is the "omission * * * from the exemption provided by Section 13 (a) (10) for various processing operations performed within the area of production." *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 267. While the court below erroneously assumed that the tobacco bulking operation is included in the Section 13 (a) (10) exemption, we have shown *supra*, pp. 36 *ff.*, that it is not so included, but on the contrary was deliberately excluded. This Court recognized in *Waialua* that the purpose of Section

13 (a) (10) was to "equalize the 'status'" under the Act of large farmers who do their own agricultural processing and of small farmers who do not have the equipment necessary for such processing (349 U. S. at 268, 269). As this Court held with respect to the sugar milling in *Waialua*, in view of the "congressional scheme" to "equalize the status of all * * * farmers," certainly "Congress would not have omitted * * * [tobacco processing] from the 'area of production' exemption if it had not concluded that it also fell outside the agriculture exemption" (349 U. S. at 268–269).

CONCLUSION.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

JAMES R. BELLINGSLEY,
Attorney,
Department of Labor.

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